


**COMMONWEALTH OF VIRGINIA**  
**Department of Environmental Quality**

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**Subject:** Enforcement Guidance Memorandum No. 1-2007  
Process for Issuing Administrative Orders to Prevent or Minimize Sanitary Sewer Overflows

**To:** Regional Directors, Division Directors

**From:** Michael G. Dowd, Director   
Division of Enforcement

**Date:** June 29, 2007

**Copies:** Rick Weeks, James Golden, Deputy Regional Directors, Regional Enforcement Managers and Representatives, Regional Compliance Auditors, Regional Compliance Managers, Central Office Compliance Managers, Central Office Enforcement Managers, Rick Linker, Sharon Brown

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**I. Background and Summary**<sup>1</sup>

In 2007, the General Assembly enacted legislation governing administrative orders “requiring corrective action to prevent or minimize overflows of sewage from [a sewerage] system.” Such overflows are called “sanitary sewer overflows,” or “SSOs.” The legislation requires the State Water Control Board (“Board”) to provide public notice and a reasonable opportunity for public comment on proposed SSO administrative orders. If a hearing is held before issuance of the order, any person who commented on the proposed SSO order must be given notice of the hearing, and a reasonable opportunity to be heard and present evidence. If no hearing is held before issuance of the order, any person who commented on the proposed SSO order may petition the Board - on the basis of new and material evidence - to set aside the order, provide a formal hearing, and make the petitioner a party to the hearing. If the Director, acting for the Board, denies the petition, he must provide notice to the petitioner and make public the reasons for the denial. A right of appeal is specified.

This guidance describes the process for issuing SSO administrative orders under the 2007 legislation, whether by consent (“SSO consent special orders”) or following a hearing (“SSO hearing special orders”) and whether or not a civil charge or penalty is assessed.<sup>2</sup>

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<sup>1</sup> Disclaimer: Guidance documents are developed as guidance and, as such, set forth presumptive operating procedures. See Va. Code [§ 2.2-4001](#). Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. No previous DEQ guidance addresses the issues here.

<sup>2</sup> The legislation also limits civil charges in SSO consent orders to \$11,000 per violation, with a maximum of \$157,500. These limits are incorporated into separate guidance on Civil Charges and Civil Penalties in Administrative Actions ([Enforcement Guidance Memorandum No. 2-2006](#)) (Revision 1; June 29, 2007).

## **II. Statutory Authority and Requirements**

In 2007, the General Assembly enacted Senate Bill 798 (“SB 798”), which added subdivision (8f) to Va. Code [§ 62.1-44.15](#):<sup>3</sup>

(8f) Before issuing a special order under subdivision (8a) or by consent under (8d), with or without an assessment of a civil penalty, to an owner of a sewerage system requiring corrective action to prevent or minimize overflows of sewage from such system, the Board shall provide public notice of and reasonable opportunity to comment on the proposed order. Any such order under subdivision (8d) may impose civil penalties in amounts up to the maximum amount authorized in § 309(g) of the Clean Water Act. Any person who comments on the proposed order shall be given notice of any hearing to be held on the terms of the order. In any hearing held, such person shall have a reasonable opportunity to be heard and to present evidence. If no hearing is held before issuance of an order under subdivision (8d), any person who commented on the proposed order may file a petition, within 30 days after the issuance of such order, requesting the Board to set aside such order and provide a formal hearing thereon. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Board shall immediately set aside the order, provide a formal hearing, and make such petitioner a party. If the Board denies the petition, the Board shall provide notice to the petitioner and make available to the public the reasons for such denial, and the petitioner shall have the right to judicial review of such decision under [§ 62.1-44.29](#) if he meets the requirements thereof.

This subdivision specifies different procedures for issuing SSO consent special orders under subdivision (8d) and SSO hearing special orders under subdivision (8a). Flow charts of the different processes are included at the end of this guidance for illustrative purposes.<sup>4</sup> Subdivision (8f) does not address the issuance of emergency special orders under subdivision (8b) or the issuance of special orders under Va. Code [§ 10.1-1186 \(10\)](#).

## **III. Procedure for Issuing SSO Consent Special Orders**

Subdivision (8d) of Va. Code § 62.1-44.15 authorizes the Board to issue administrative special orders “with the consent of any owner” who is in violation of State Water Control Law or associated regulations, permits or orders. The terms of a proposed consent special order are negotiated by facility owners and authorized DEQ staff. Notice of the proposed consent special order is published at least 30 days prior to final settlement of the civil enforcement action, both in a local newspaper and in *The Virginia Register of Regulations*. Notice also appears on the DEQ website. Public comment is considered, and an amended, proposed consent special order is prepared, if one is needed and if the owner agrees. The proposed order is subsequently presented at a meeting of the Board. The Board considers the proposed consent special order, public comment, and any response to public comment. DEQ staff usually present the case, and the Board in its discretion may consider statements by the owner or the public. The Board then may authorize the Director or his designee to issue the consent special order, or, with consent of the owner, to amend and issue the

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<sup>3</sup> Following legislative enactment and signature by the Governor, SB 798 became [2007 Acts c. 144](#).

<sup>4</sup> The flow charts do not include all steps or options, and they do not replace adherence to the Virginia Administrative Process Act, Va. Code § 62.1-44.15 or the text of this guidance.

consent special order. The Board may also direct renegotiation of the order, or it may take other action as it deems appropriate. Consent special orders usually include provisions for facility owners to waive their right to a hearing or other administrative proceeding, including the right to a formal hearing under Va. Code [§ 2.2-4020](#) of the Virginia Administrative Process Act (“APA”).<sup>5</sup> The waiver does not extend to administrative proceedings to enforce the order.

Subdivision (8f) does not fundamentally alter the existing process prior to issuance for SSO consent special orders.<sup>6</sup> Because there may be widespread public interest in proposed SSO consent special orders, however, DEQ staff may, in their discretion, conduct a “public hearing” on a such an order in accordance with the Board’s “Procedural Rule No. 1” ([9 VAC 25-230-10 through -90](#)).<sup>7</sup> The facility owner is a party to such a proceeding, and interested persons have an opportunity to submit “factual data, argument and proof” ([9 VAC 25-230-30](#)), subject to the terms of the hearing notice and the provisions of [9 VAC 25-230-60](#). DEQ staff may prepare a written response to comment. Notice of the “public hearing” may be combined with public notice of the proposed SSO consent special order.

The proposed SSO consent special order, amended and agreed as necessary, is then considered at a Board meeting, just as any other consent special order under (8d).<sup>8</sup>

Subdivision (8f) sets out new rights for persons who comment on a proposed SSO consent special order after the order is issued. Any person who commented on the proposed order may file a petition, within 30 days after the issuance of the order, requesting that the Board set aside the SSO consent special order and provide a formal hearing on it. The Director, as authorized by the Board, may rely on the written record or staff certifications in considering the petition. If the evidence presented by the petitioner (1) is material and (2) was not considered in the issuance of the order, the Director should immediately set aside the order, provide for a formal hearing, and make the petitioner a party to the hearing. All other persons who commented on the proposed SSO consent special order should be given notice of the formal hearing and should have a reasonable opportunity to be heard and to present evidence there. The process then follows that for SSO hearing special orders, as described in Sections IV and V, below. Sections IV and V include several specific provisions for notices and hearings following a successful petition on an SSO consent special order. To ensure that the Director is authorized to act on behalf of the Board on the petition, staff should include the following recommendation (in addition to a recommendation to the Board that it approve the proposed SSO consent special order):

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<sup>5</sup> See Attachment 2A-4 to the [1999 DEQ Enforcement Manual](#).

<sup>6</sup> Before SB 798, public notice and comment were required by regulation. [9 VAC 25-31-910 B 3](#); see Va. Code [§ 62.1-44.15:4 E](#) (requirement to notify locality where the alleged offense has or is taking place, upon commencement of public notice of an enforcement action).

<sup>7</sup> By definition, a “public hearing” under Procedural Rule No. 1 is an informal fact finding proceeding under Va. Code [§ 2.2-4019](#). See [9 VAC 25-230-30](#).

<sup>8</sup> Because of possible petitions and the time necessary to consider them, SSO consent orders should direct payment of any civil charges by the party **within 60 days** of the date of the order, rather than the customary 30 days. See Section D of Attachment 2A-4 to the [1999 DEQ Enforcement Manual](#).

It is further recommended that the Board authorize the Director to accept petitions on its behalf requesting this order to be set aside and to provide a formal hearing thereon and to make a determination whether to set aside the order and to provide such formal hearing based on the requirements in Virginia Code § 62.1-44.15 (8f).

If the Director denies the petition, he should provide notice to the petitioner and make available to the public the reasons for the denial. The petitioner has the right to judicial review, subject to the requirements of Va. Code [§ 62.1-44.29](#).

#### **IV. SSO Hearing Special Orders – Proposed Orders, Notice and Comment**

Subdivision (8a) of Va. Code § 62.1-44.15 authorizes the Board to issue “special orders” to owners of facilities who are permitting or causing the pollution of state waters, among other circumstances. Orders issued under subdivision (8a) must meet the requirements of subdivision (8b) and follow a formal hearing under Va. Code [§ 2.2-4020](#) of the APA. Formal hearings must be held before a hearing officer appointed by the Supreme Court of Virginia, or, at the owner’s request, before a quorum of the Board.<sup>9</sup>

Prior to subdivision (8f), there were no requirements for the Board to provide public notice or an opportunity for public comment on proposed SSO hearing special orders. Nor were there requirements to notify commenters of any hearing, or to allow them to be heard and present evidence. Subdivision (8f) now specifically requires these elements.

Accordingly, before initiating a formal hearing, staff will develop a proposed SSO hearing special order for public notice and comment, containing proposed findings of fact and conclusions of law and the injunctive and penalty relief requested. Any draft consent order that was developed during failed negotiations with the owner can be used as the basis for preparing the proposed SSO hearing special order. In developing the proposed order, however, staff are not bound by positions taken in negotiation, and staff should prepare the strongest order supported by the available evidence, including the assessment of any civil penalty.<sup>10</sup>

Under subdivision (8f), the public must be given notice of and an opportunity to comment on a proposed SSO hearing special order. Public notice follows the process in [9 VAC 25-31-910 B 3](#). DEQ staff should inform the owner of the impending public notice and comment on the order. Any person who comments on the proposed order must also be given notice of any hearing to be held on the order, and a reasonable opportunity to be heard and to present evidence there. The notice to commenters should set a deadline (e.g., 30 days after the notice) for commenters to request an opportunity to be heard and present evidence. DEQ may name a person separate from the hearing presenter to coordinate public comment and to work with those who request to be heard and present evidence at the hearing.

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<sup>9</sup> Va. Code [§ 62.1-44.15 \(8b\)](#); see Va. Code [§ 2.2-4001](#) (definition of “hearing”).

<sup>10</sup> See footnote no. 2.

If the hearing is being held as the result of a successful petition of an SSO consent special order, public notice and comment **on the order** need not be repeated. The petitioner, however, is a party to the formal hearing, and any person who commented on the proposed SSO consent special order must be given notice of the hearing and the opportunity to be heard and present evidence there. Again, the notice to commenters should set a deadline (e.g., 30 days after the notice) for commenters to request an opportunity to be heard and present evidence.

## **V. SSO Hearing Special Orders – Hearing and Decision**

After notice and comment, the hearing follows the requirements of Va. Code [§ 2.2-4020](#) and any applicable guidance. DEQ and the facility owner (and the petitioner, if the hearing is the result of a successful petition) are parties to the hearing. Any person who has commented on the proposed order shall have a reasonable opportunity to be heard and to present evidence in accordance with the notice.<sup>11</sup> The hearing officer, or quorum of the Board, may make such arrangements as are appropriate for the taking of evidence from commenters. The hearing officer, or quorum of the Board, will make recommended findings of fact and conclusions of law, including proposed injunctive relief and a proposed civil penalty, as appropriate, in accordance with statute, guidance, and authority. Hearing officers must make recommendations within 90 days of the hearing, unless otherwise agreed. Va. Code [§ 2.2-4024 D](#).

After any hearing in which a hearing officer is used, the Board will consider any recommendations of the hearing officer along with any exceptions filed by the parties. Any person who participated in the prior proceeding, whether conducted by a hearing officer or the Board itself, must be provided an opportunity to respond at the Board meeting to any summaries of the prior proceeding prepared by or for the Board.<sup>12</sup> The Board may, in its discretion, take other public comment. The Board will then issue the SSO hearing special order, amend and issue the SSO hearing special order, reject the order or take other action as it deems appropriate under Va. Code [§ 2.2-4020](#). The timetables for decisions are set out in Va. Code [§ 2.2-4021](#) (generally within 30 days from the date that the Board receives a hearing officer's recommendation.)

Following the issuance of the SSO hearing special order, parties and persons who commented on the proposed order may seek judicial review, subject to the requirements of Va. Code [§ 62.1-44.29](#).

## **VI. Electronic Copies; Contact**

An electronic copy of this guidance is available on DEQ's website at: <http://www.deq.virginia.gov/enforcement/manual.html>. Please contact Division of Enforcement staff with any questions regarding the application of this guidance.

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<sup>11</sup> See Va. Code [§ 62.1-44.27](#) (rules of evidence in Board hearings).

<sup>12</sup> Va. Code [§ 2.2-4021 A](#).

